



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for May 6, 2022**

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### **BOARD DECISIONS**

**Appellant:** Dwyne Chambers

**Agency:** Department of Homeland Security

**Decision Number:** [2022 MSPB 8](#)

**Docket Number:** PH-1221-17-0161-W-1

**Issuance Date:** May 2, 2022

**Appeal Type:** Individual Right of Action (IRA)

#### **EXHAUSTION**

#### **CONTRIBUTING FACTOR**

#### **NONFRIVOLOUS ALLEGATIONS**

The appellant filed a complaint with OSC, alleging that the agency took various actions against him in reprisal for protected disclosures and activities. After OSC closed the complaint, the appellant filed an IRA appeal with the Board. The administrative judge dismissed for lack of jurisdiction.

**Holding:** The appellant's failure to respond to OSC's preliminary determination letter was not a proper basis for finding that he did not meet the exhaustion element of his jurisdictional burden.

- The exhaustion element in an IRA appeal entails both substantive and procedural requirements. The administrative judge found that the appellant failed to meet the procedural requirements because OSC sent him its statutorily required preliminary determination letter, but the appellant did not respond before OSC issued its closure letter. The Board disagreed, noting that the relevant statutory scheme allowed the appellant to respond to OSC's preliminary determination letter, but it did not require that he do so.

**Holding: Some of the appellant's requests for corrective action were barred by a settlement agreement**

- The appellant entered into a settlement agreement a couple years before his IRA appeal. Based on the language of the agreement, the Board determined that the appellant could not pursue claims arising before that agreement.

**Holding: The appellant met the exhaustion element for some of his claims.**

- For those claims not precluded by the prior settlement agreement, the Board recognized that the substantive requirements of exhaustion are met when an appellant has provided OSC with sufficient basis to pursue an investigation. To prove exhaustion, an appellant may provide their initial complaint or correspondence with OSC. Alternatively, an appellant may provide other evidence, such as an affidavit, declaration, or the attestation included in an initial Board appeal form. In this case, the appellant exhausted claims that 1 personnel action was reprisal for 2 protected disclosures and 2 protected activities.

**Holding: The appellant failed to present the nonfrivolous allegations necessary to satisfy the remainder of his jurisdictional burden.**

- The contributing factor criterion can be satisfied by the knowledge/timing test. If an appellant fails to satisfy the knowledge/timing test, the Board must consider other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding official, and whether those individuals had a desire or motive to retaliate against the appellant.
- Here, the appellant failed to present the nonfrivolous allegations for the contributing factor element of his jurisdictional burden. Among other things, the circumstances did not satisfy the knowledge/timing test and the appellant presented little more than conclusory and unsubstantiated speculation of a retaliatory motive.

**Appellant: John Edwards**

**Agency: Department of Labor**

**Decision Number: [2022 MSPB 9](#)**

Docket Number: DC-1221-16-0227-W-1

Issuance Date: May 5, 2022

Appeal Type: Individual Right of Action (IRA)

## **JURISDICTION RETROACTIVITY**

The appellant filed an IRA appeal, alleging that he was reassigned in retaliation for complaints that the agency was discriminating against a subordinate and others based on their race. The administrative judge dismissed for lack of jurisdiction, finding that the appellant failed to nonfrivolously allege that his disclosures or activities were protected by the relevant provisions of 5 U.S.C. § 2302.

**Holding: The appellant's disclosures about race discrimination are not covered by section 2302(b)(8).**

- The overwhelming weight of decisions from the Board and circuit courts support exclude EEO reprisal from consideration under section 2302(b)(8). This is because, inter alia, the legislative history reflects an intent to create a division in which allegations of discrimination in violation of title VII cannot be brought under the whistleblower protection statutes and allegations of reprisal for whistleblowing cannot be brought under title VII. The proper forum for the appellant's allegation of reprisal for filing an EEO complaint is the EEOC.
- To the extent that the Board reached a contrary conclusion in *Armstrong v. Department of Justice*, 107 M.S.P.R. 375 (2007) and *Kinan v. Department of Defense*, 87 M.S.P.R. 561 (2001), those decisions are overruled. Neither decision provided any explanation for their departure from established precedent on this issue.

**Holding: The appellant's activity is not covered by the relevant provisions of section 2302(b)(9).**

- In an IRA appeal, such as this, an appellant may seek corrective action for activity covered by section 2302(b)(9)(A)(i), but not section 2302(b)(9)(A)(ii). Here, the appellant's alleged activity was not covered under section 2302(b)(9)(A)(i), because it did not seek to remedy an alleged violation of 2302(b)(8).
- His activity was also not covered under the assistance provision, section 2302(b)(9)(B), because, although the appellant may have intended to

support his subordinate, the record contained no indication that the subordinate had filed any appeal, complaint, or grievance.

- Prior to December 12, 2017, section 2302(b)(9)(C) protected certain activity involving an agency's Inspector General or the Special Counsel. The provision has since been amended in a way that broadens its scope. However, the Board found that the amendment is not retroactive, so it did not apply to this appeal.

## COURT DECISIONS

### NONPRECEDENTIAL:

*Neese v. Merit Systems Protection Board*, [No. 2021-2321](#) (Fed. Cir. May 4, 2022) (MSPB Docket No. DC-0752-21-0420-I-1) Affirming an administrative judge's decision to dismiss the appellant's appeal as untimely.

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